JOBNAME: No Job Name PAGE: 1 SESS: 1 OUTPUT: Thu Jul 24 13:48:06 2014

Berjaya Development Sdn Bhd v Keretapi Tanah Melayu Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(NCC)(A)-2535–10 OF 2012
MOHD HISHAMUDIN, ABDUL AZIZ ABD RAHIM AND MOHAMAD ARIFF JJCA
19 APRIL 2013

Civil Procedure — Appeal — Notice of — Appeal to Court of Appeal against High Court's dismissal of three separate applications, two of which were dismissed on one date and one on another — Notice of appeal failed to state clearly which decision made on which date was being appealed against — Notice of appeal merely stated the two decision dates and dates of the three applications which were dismissed — Whether notice of appeal improper and defective for ambiguity — Whether notice of appeal for each decision should have been filed

The respondent had obtained a winding up order against the appellant. The official receiver ('the OR') was appointed liquidator of the appellant. About a month later, the appellant's managing director ('Kok') applied (vide encl 11) to the High Court to, inter alia, set aside the winding up order. On 18 September 2012, the High Court struck out encl 11 for being misconceived. That same afternoon, Kok filed two applications — encl 16, to have the matter transferred to the High Court at Shah Alam, and encl 19, to again have the winding up order set aside. Except for one prayer, encl 19 was identical to encl 11. On 10 October 2012, the court dismissed both encls 16 and 19 holding, inter alia, that (a) encl 19 did not have any legal basis under the Companies Act 1965 and it was also not maintainable on the ground of res judicata or issue estoppel (b) the OR, who was present during the proceedings, did not consent to encl 16 and (c) only the OR could appear and speak on behalf of the company. The appellant appealed to the Court of Appeal against the dismissal of the three applications by filing a single notice of appeal. A preliminary objection was taken by the respondent that the notice of appeal was defective in that it sought to appeal against orders of dismissal that were made on different dates.

Held:

(1) Form 1 in the First Schedule of the Rules of the Court of Appeal 1994 required the appellant to state in the notice of appeal the decision appealed against, the place where the decision was given and the date it was given. The appellant's notice of appeal did not state clearly which decision and decided on what date was being appealed against. It simply said the appellant was appealing 'against the decision of YA Nalini Pathmanathan J at Kuala Lumpur High Court on 18.9.2012 and

JOBNAME: No Job Name PAGE: 2 SESS: 1 OUTPUT: Thu Jul 24 13:48:06 2014

10.10.2012 which dismissed all the appellant's applications dated 5.9.2012, 14.9.2012 and 18.9.2012'. The notice did not state which of the three decisions was decided on 18 September 2012 and which was decided on 10 October 2012. The court was in the dark as to which decision and what matter was decided, respectively, on those two dates. The notice of appeal was therefore defective for ambiguity (see paras 15–16).

(2) As to the appellant's argument that it was possible for one notice of appeal to be filed for all the three decisions, the court was of the view that that might be so provided the applications were heard together and the decision on them was given on a single date and the notice of appeal clearly described the applications involved and the respective decisions. The filing of one notice of appeal in respect of all the three decisions was improper for being ambiguous and uncertain. The proper way would have been to file three notices of appeal, one in respect of each decision that was appealed against (see paras 17–18).

[Bahasa Malaysia summary

Responden memperolehi perintah penggulungan terhadap perayu. Pegawai penerima ('PP') dilantik menjadi likuidator perayu. Lebih kurang sebulan kemuian, pengarah urusan perayu ('Kok') memohon (melalui lampiran 11) kepada Mahkamah Tinggi untuk, antara lain, mengetepikan perintah penggulungan tersebut. Pada 18 September 2012, Mahkamah Tinggii membatalkan lampiran 11 kerana salah tanggap. Pada tengah hari yang sama, Kok memfailkan dua permohonan — lampiran 16, untuk perkara tersebut dipindahkan ke Mahkamah Tinggi Shah Alam, dan lampiran 19, untuk sekali lagi perintah penggulungan tersebut diketepikan. Kecuali untuk satu permohonan, lampiran 19 adalah sama dengan lampiran 11. Pada 10 Oktober 2012, mahkamah menolak kedua-dua lampiran 16 dan 19 dengan memutuskan, antara lain, bahawa (a) lampiran 19 tidak mempunyai asas undang-undang di bawah Akta Syarikat 1965 dan ia juga tidak kekal atas alasan res judicata atau isu estopel (b) PP, yang hadir semasa prosiding, tidak memberi izin kepada lampiran 16 dan (b) hanya PP boleh hadir dan bersuara bagi pihak syarikat. Perayu merayu ke Mahkamah Rayuan terhadap penolakan ketiga-tiga permohonan dengan memfailkan satu notis rayuan. Bantahan awal dibuat oleh responden bahawa notis rayuan adalah cacat dengan itu ia memohon merayu terhadap perintah-perintah penolakan yang dibuat pada tarikh yang berasingan.

Diputuskan:

(1) Borang 1 dalam Jadual Pertama Kaedah-Kaedah Mahkamah Rayuan 1994 memerlukan perayu menyatakan di dalam notis rayuan keputusan yang dirayukan, tempat di mana keputusan diberikan dan tarikh ia diberikan. Notis rayuan perayu tidak menyatakan dengan jelas

JOBNAME: No Job Name PAGE: 3 SESS: 1 OUTPUT: Thu Jul 24 13:48:06 2014

keputusan yang manakah dan diputuskan pada tarikh apa yang dirayukan. Ia hanya menyatakan perayu merayu 'against the decision of YA Nalini Pathmanathan J at Kuala Lumpur High Court on 18.9.2012 and 10.10.2012 which dismissed all the appellant's applications dated 5.9.2012, 14.9.2012 and 18.9.2012'. Notis tidak menyatakan ketiga-tiga keputusan yang manakah yang diputuskan pada 18 September 2012 dan yang mana diputuskan pada 10 Oktober 2012. Mahkamah tidak mengetahui terhadap keputusan mana dan perkara apa yang diputuskan, masing-masing, pada kedua tarikh tersebut. Notis rayuan oleh itu adalah cacat kerana ketaksaan (lihat perenggan 15–16).

(2) Berkenaan penghujahan perayu yang mana adalah mungkin untuk satu notis rayuan difailkan untuk ketiga-tiga keputusan, mahkamah berpandangan bahawa ia mungkin dengan syarat permohonan-permohonan didengar bersama dan keputusan terhadapnya diberi pada satu tarikh dan notis rayuan jelas menyatakan permohonan-permohonan yang terlibat dan keputusan masing-masing. Pemfailan notis rayuan berkaitan kesemua ketiga-tiga keputusan adalah salah kerana tidak jelas dan tidak tentu. Cara yang betul adalah memfailkan tiga notis rayuan, satu berkaitan setiap keputusan yang dirayukan (lihat perenggan 17–18).]

Notes

For cases on notice of, see 2(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 1529–1647.

Legislation referred to

Companies Act 1965 s 218(2)(a)
Rules of Court 2012 O 11 r 4
Rules of the Court of Appeal 1994 r 5, r 5(4), First Schedule, Form 1

Appeal from: Civil Suit No 28NCC-453–06 of 2012 (High Court, Kuala Lumpur)

Chin Teng Yoong (TY Chin & Assoc) for the appellant.
Andrew Teh (Sara Anthony with him) (Wong Lu Peen & Tunku Alina) for the respondent.

Abdul Aziz Abd Rahim JCA:

INTRODUCTION

[1] This is the appellant's appeal against the orders of dismissal by the High Court at Kuala Lumpur in respect of three notices of motion. The first notice

JOBNAME: No Job Name PAGE: 4 SESS: 1 OUTPUT: Thu Jul 24 13:48:06 2014

of motion dated 5 September 2012 (encl 11) was to set aside a winding up order. The second notice of motion, dated 14 September 2012 (encl 16), was to transfer the case to the Shah Alam High Court pursuant to O 11 r 4 of the Rules of Court 2012. The appellant also had filed in the High Court another notice of motion dated 18 September 2012 (encl 19) to set aside the same winding up order.

[2] On 18 September 2012, the High Court dismissed encl 11; and on 10 October 2012 the same High Court dismissed encls 19 and 16. The appellant alleged that the three motions were dismissed without giving the appellant a fair hearing.

BACKGROUNDS FACTS

[3] The background to the action before the High Court and this appeal is as follows.

[4] On 27 August 2009, a Civil Application No 08–205–207(W) was made to the Federal Court for costs pursuant to the Federal Court's dismissal of the appellant's application for leave to appeal to the Federal Court against a decision of the Court of Appeal in Civil Appeal No W-02–567 of 1997. The Federal Court allowed the application and ordered the sum of RM10,000 as costs to be paid by the appellant to the respondent.

[5] The appellant failed to pay the costs to the respondent as so ordered by the Federal Court.

[6] On 12 March 2012, a statutory notice of demand under s 218(2)(a) of the Companies Act 1965 was served on the respondent.

[7] In June 2012, the respondent commenced a winding up proceedings against the appellant. At the hearing of the petition on 8 August 2012, the appellant did not appear and the High Court granted the winding up order sought by the respondent.

[8] On 5 September 2012, one Mr Kok Kon Sung, the appellant's managing director, filed an application to set aside the winding up order as well as to ask for the Federal Court's order of 27 August 2009 (that awarded costs to the respondent) be set aside and all proceedings be stayed.

[9] On 18 September 2012, the learned High Court judge, after hearing parties, ruled that the application was misconceived and, accordingly, struck off the application.

JOBNAME: No Job Name PAGE: 5 SESS: 1 OUTPUT: Thu Jul 24 13:48:06 2014

[10] But, Mr Kok Kon Sung did not stop there. At 12.44pm on the same day, ie on 18 September 2012, he filed an identical application to once again to set aside the winding up order along with other reliefs. In addition to that application, Mr Kok Kon Sung also filed an application to transfer the proceedings to High Court of Shah Alam. Both applications were struck off by the learned High Court judge on 10 October 2012.

[11] In her brief judgment which is recorded in the notes of proceedings of 10 October 2012, the learned High Court judge, in dismissing the two applications, said as follows:

> On a previous occasion, ie on 18 September 2012, Mr Kok made an identical application save for one prayer and having heard the same I dismissed it and explained to Mr Kok that the application was misconceived as it is not possible to set aside a winding up order in the manner he seeks. Neither is it possible to transfer the proceedings to Shah Alam unless the OR so desires. I further pointed out to Mr Kok that as the respondent had been wound up, only the OR could appear on behalf of the wound up company. In other words, Mr Kok has no 'voice' or presence which this Court can consider for purposes of any such application.
>
> ...
>
> The OR is present and indicates that he is not agreeable to the transfer. I have perused the application and it appears to the Court that this application has to be dismissed because:
>
> (a) it has no legal basis under the Companies Act 1965;
>
> (b) res judicata or issue estoppels comes into play as an identical application was filed previously;
>
> Again I must reiterate that I have exercised great patience in dealing with this application as Mr Kok is a layman; and
>
> (c) the correct recourse it appears to this Court is for the contributory of the respondent to apply under s 243 of the Companies Act after resolving the very small debt owed to the petitioner of RM9,500.00.
>
> Enclosure 19 is dismissed. Enclosure 16 is similarly dismissed.

[12] Not satisfied with the decisions of the High Court in dismissing all the three applications, the appellant now appealed to this court against all the three orders by the High Court by filing a notice of appeal dated 16 October 2012.

THIS APPEAL

[13] The learned counsel for the respondent raised a preliminary objection to this appeal arguing that the appeal is not properly before the court. He submitted that the appellant is appealing against three separate orders by the High Court. The first order of the High Court appealed against, was made on the 18 September 2012 — this is the order dismissing the appellant's

JOBNAME: No Job Name PAGE: 6 SESS: 1 OUTPUT: Thu Jul 24 13:48:06 2014

application to set aside the winding up order of 8 August 2012. The second and third orders of the High Court — ie the order dismissing the appellant's second application to set aside the winding up order and the order dismissing the appellant's application to transfer the case to Shah Alam High Court respectively — were made on 10 October 2012. But, as can be seen from the above notice of appeal, the appellant had filed only one notice of appeal against all the three orders made by the High Court. It is pertinent to note that the three orders were made by the High Court at different dates and times. Therefore it was submitted that the filing of only one notice of appeal against all the three orders of the High Court is improper.

[14] Learned counsel for the appellant however argued that it is possible to file one notice of appeal for all the three decisions by the High Court. Learned counsel cited to us r 5 of the Rules of the Court of Appeal 1994 (PU(A) 524/94) in particular r 5(4). For ease of reference we produce r 5 in full:

> Appeal to be by re-hearing on notice
>
> 5 (1) Appeals to the Court shall be by way of re-hearing and shall be brought by giving notice of appeal.
>
> (2) Security for costs shall be given as provided in rule 17.
>
> (3) A notice of appeal shall substantially be in Form 1 in the First Schedule.
>
> (4) any appellant may appeal from the whole or part of a judgment or order and the notice of appeal shall state whether the whole or part only, and what part, of the judgment or order is complained of.

[15] Referring to Form 1 in the First Schedule of the Rules of the Court of Appeal 1994, we notice that the appellant is required to state the decision appeals against, the place where the decision was given and the date it was given in the notice of appeal. When we scrutinised the notice of appeal by the appellant (at p 11 appeal record), the notice read as follows:

> NOTIS RAYUAN
>
> SILA AMBIL PERHATIAN bahawa Responden yang dinamakan di atas tidak berpuas hati dengan keputusan yang diberikan oleh Yang Arif Hakim Nalini Pathmanathan di Mahkamah Tinggi Kuala Lumpur pada 18 September 2012 dan 10 Oktober 2012 menolak semua permohonan Responden bertarikh 5.9.2012, 14.9.2012 dan 18.9.2012 tanpa hujahan oleh kedua pihak, merayu kepada Mahkamah Rayuan terhadap keseluruhan keputusan tersebut.
>
> Bertarikh pada 16 hari bulan Oktober 2012.
>
> bp Perayu/Responden

[16] It is obvious from the notice of appeal filed by the appellant in this case that the appellant did not state clearly which decision and decided on what date that he is appealing against. The notice of appeal simply says that the appellant

JOBNAME: No Job Name PAGE: 7 SESS: 1 OUTPUT: Thu Jul 24 13:48:06 2014

is appealing against the decision of YA Nalini Pathmanathan J at Kuala Lumpur High Court on 18 September 2012 and 10 October 2012 which dismissed all the appellant's application dated 5 September 2012, 14 September 2012 and 18 September 2012. The notice of appeal does not state which of the three decisions was decided on 18 September 2012 and which was decided on 10 October 2012. Therefore, in our view, the notice of appeal is defective for its ambiguity.

[17] With regard to the counsel's argument that it is possible for one notice of appeal to be filed for all the three decisions, we are of the view that, that may be so provided the applications were heard together and the decision was given on one single date, and that the notice of appeal clearly describes the applications involved and the respective decisions.

[18] We have pointed out earlier that in this case, there were three decisions by the YA Nalini Pathmanathan J at Kuala Lumpur High Court that there are on appeal by the appellant in this appeal. One of the decisions was decided on 18 September 2012. The other two decisions were decided on 10 October 2012. Reading the notice of appeal filed by the appellant, we are in the dark which decision and related to what matter was decided on 18 September 2012. Similarly, we also do not know which decision and related to what matter was decided on 10 October 2012. In the circumstances, we are of the view that the filing of one notice of appeal in respect of all the three decisions by the same High Court in this case, is improper for being ambiguous and uncertain. We are of the view that the proper way is to file either three notices of appeal, one in respect of each decision that is appealed against.

[19] In the circumstances, we find that the notice of appeal filed by the appellant in this case is defective; and we allow the preliminary objection.

[20] For the above reasons, we are unanimous in dismissing this appeal with costs. We award costs of RM5,000 to the respondent and costs to be borne by the director, Mr Kok Kon Sung who brought this appeal without the consent of the liquidator. The deposit is refunded to the appellant.

Order accordingly.

Reported by Ashok Kumar